Filed 6/7/10 P. v. Gonzales CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OTTO JAIME GONZALES, Defendant and Appellant.	G041259 (Super. Ct. No. 05CF3391) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer and Richard F. Toohey, Judges. Affirmed.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janet Neeley, Bradley A. Weinreb and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Otto Jaime Gonzales guilty of four counts of committing lewd acts on two girls under age 14 (Pen. Code, § 288, subd. (a); all statutory references are to the Penal Code unless noted), and found he was released on felony bail at the time of certain offenses. He seeks independent review of the trial court's *Pitchess* ruling (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)), contends the 15 percent limitation on conduct credits (§ 2933.1) violates his equal protection rights, and argues recent amendments to section 4019 entitle him to additional presentence conduct credits. None of these contentions have merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of October 24, 2005, defendant, then age 42, waited in his car for S., his girlfriend's 13-year-old daughter, to arrive home from school. He told S. he was there to connect a new computer, but asked her not to tell her mother. After about 10 minutes, S.'s neighbor and friend, B., came over. Defendant asked B. to go to her apartment to get a cord for the computer. While B. was away, defendant asked S. personal questions, including whether she knew how to kiss and if she would like him to show her. She said no and declined his invitation. Undeterred, he trapped her against the wall, pressed his body against hers, and kissed her on the lips, forcing his tongue inside her mouth. She tried to push him away. He told her to stay calm and kissed her again, but stopped when B. came into the apartment. Defendant persuaded B. to leave. He then gave S. $10, said he would buy her new clothes, and told her not to tell her mother, stating it would be their secret. After S.'s brother came home, defendant prepared to

leave, but before he departed, he grabbed and hugged S., told her he was going to show her how to do many things, and gave her another kiss.

After defendant departed, S. began crying and told B. what had happened. Defendant telephoned later and told S. he would tell her mother she was a perfect host. S. reported the incident to her mother, who confronted defendant. He began crying and stated he had only given her a fatherly kiss. Police officers arrested defendant after S.'s mother reported the incident the following day. He admitted most of the conduct to an investigating officer, agreeing it was wrong to kiss a 13 year old. He posted bail and was released in December 2005.

After his release, defendant began dating 12-year-old A.'s mother. In February 2006, he asked A. for a hug, which she permitted. He put his hand on her breast. About a month later, defendant made A. lie down in a bedroom, pressed his crotch against her rear end while both were clothed, and "humped" her for about a minute. He breathed hard and told her to remain still. On a subsequent occasion, he showed her pornography on a computer and told her if she became aroused she could put her fingers into her vagina. He tried to show her but she would not let him. He continued to press and grope her for about two minutes, holding her hands and instructing her to remain still. On another occasion, he unbuttoned his pants and humped her while lying on top of her. She looked down and saw "sperm," and he told her to change her pants.

At trial, defendant testified and denied kissing or having any physical contact with S. and claimed he was never alone with her. He denied telling S.'s mother or police officers that he kissed S. He also denied any sexual contact with A., explaining he did not have a good relationship with A. because he favored restricting her social

activities, and he and A.'s mother had discussed moving to Guatemala, which A. opposed.

A jury convicted defendant as indicated above, and the trial court sentenced him to eight years in prison in November 2008.

II

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Denying Pitchess Discovery*

Before trial, defendant moved to discover (*Pitchess, supra,* 11 Cal.3d 531) Santa Ana police personnel records relating to the police officer who arrested and interviewed him concerning the incident involving S. The lower court found good cause to review the officer's file (*People v. Samuels* (2005) 36 Cal.4th 96, 109), conducted an in camera review (Evid. Code, § 1045, subd. (b)), and found no discoverable items (see *People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1229 (*Mooc*)).

The parties agree we should independently review the confidential proceedings. (See *Mooc*, *supra*, 26 Cal.4th at p. 1229.) We have reviewed the sealed transcript of the in camera hearing. The judge described the items from the officer's file on the record. The file contained nothing reflecting adversely on the officer's veracity. Consequently, the court did not abuse its discretion in ruling there were no discoverable items in the officer's file. (*Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 413.)

B. *Section 2933.1's Limitation on Conduct Credit Does Not Violate Equal Protection*

Defendant contends the 15 percent limitation on work-conduct credits (§ 2933.1)[1] for his convictions under section 288, subdivision (a), violates his constitutional right to equal protection. We disagree.

---

[1] Section 2933.1 provides: "(a) Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall

Defendant relies on *People v. Hofsheier* (2006) 37 Cal.4th 1185 (*Hofsheier*). There, the court held a mandatory sex offender registration requirement for a 22 year old convicted of nonforcible oral copulation (§ 288a, subd. (b)(1)) with a 16-year-old minor violated equal protection because no registration requirement existed for a similarly situated defendant convicted of nonforcible unlawful sexual intercourse with a minor (§ 261.5, subd. (a)). (See also *People v. Picklesimer* (2010) 48 Cal.4th 330 (*Picklesimer*) [nonforcible sexual penetration of a 17 year old in violation of section 289, subdivision (h) cannot be a basis for mandatory registration].)

Defendant argues he is similarly situated to a person convicted of unlawful sexual intercourse with a 12 or 13 year old. (§ 261.5, subd. (d) (hereinafter § 261.5(d).) Section 261.5(d) is not a felony offense listed in subdivision (c) of section 667.5 and therefore a conviction under that section does not trigger the 15 percent credit limitation in section 2933.1. We do not find defendant's reasoning persuasive.

As *Hofsheier* recognized, "in most cases, . . . persons who commit different crimes are not similarly situated . . . ." (*Hofsheier*, *supra*, 37 Cal.4th at p. 1199.) Defendant is not similarly situated to a defendant convicted of violating section 261.5(d) because section 288, subdivision (a), unlike 261.5(d), contains a specific intent element

---

accrue no more than 15 percent of worktime credit, as defined in Section 2933. [¶] (b) The 15-percent limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. However, nothing in subdivision (a) shall affect the requirement of any statute that the defendant serve a specified period of time prior to minimum parole eligibility, nor shall any offender otherwise statutorily ineligible for credit be eligible for credit pursuant to this section. [¶] (c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a). [¶] (d) This section shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative."

and "[t]he higher mental state required for a conviction under section 288 is a distinction that is meaningful in deciding whether a person convicted under that statute is similarly situated with one convicted under section 261.5." (*People v. Cavallaro* (2009) 178 Cal.App.4th 103, 114; *People v. Anderson* (2008) 168 Cal.App.4th 135, 142.) Also, "in *Hofsheier*, 'the equal protection analysis hinged on the fact that the defendant — had he engaged in unlawful, nonforcible sexual intercourse with the 16-year-old girl instead of unlawful, nonforcible oral copulation — would have *under no circumstances* been subject to mandatory registration. [Citation.] That is not the case here.' [Citation.] [H]ad defendant actually engaged in either unlawful, nonforcible sexual intercourse, or unlawful, nonforcible oral copulation with the alleged victim . . . he would have been subject to prosecution under section 288, subdivision (a), for the commission or attempted commission of a lewd act on a minor under 14, a crime for which sex offender registration is mandatory. [Citations.] The fact that defendant — had he had sexual intercourse with a 13-year-old victim — could have been charged under section 261.5, subdivision (d), an offense that is not subject to mandatory registration under section 290, rather than section 288, subdivision (a), does not suggest that mandatory registration based on defendant's conviction under section 288.2 constituted a violation of equal protection. [Citation.]" (*People v. Kennedy* (2009) 180 Cal.App.4th 403, 410-411, original italics.)

Defendant does not cite, nor does our independent research reveal, any case that found an equal protection violation when the 15 percent limitation on good conduct credits was applied to a defendant convicted of committing lewd acts on a child under 14 years of age. The cases defendant relies on, *People v. Garcia* (2008) 161 Cal.App.4th 475 and *People v. Hernandez* (2008) 166 Cal.App.4th 641, 651,[2] involved lewd acts with victims age 14 or older.

---

[2] The Supreme Court disapproved of *Garcia and Hernandez* on an unrelated procedural point in *Picklesimer*, *supra*, 48 Cal.4th at page 338, footnote 4.

Defendant also relies on *In re J.P.* (2009) 170 Cal.App.4th 1292. There, a mentally disabled 12 year old engaged in sexual contact with his five-year-old brother and seven-year-old sister. A juvenile wardship petition was filed alleging lewd contact with a child under 14 years of age on his sister (§ 288, subd. (a)) and forcible oral copulation on his brother (§ 288a, subd. (c)). As part of a negotiated disposition, the petition was amended to add a third count of nonforcible oral copulation of a person under 18 per section 288a, subdivision (b)(1), which the minor admitted in exchange for a dismissal of the original charges. The defendant later appealed the denial of his request to set aside the registration requirement based on the reasoning of *Hofsheier*. The prosecution argued *Hofsheier*'s equal protection analysis did not apply where the victims were five and seven years old. The appellate court disagreed: "Whatever the underlying facts of appellant's offense, he admitted only one count of oral copulation under section 288a, subdivision (b)(1). We are unconvinced by the People's proposed approach, which would require us to look beyond the statutory elements of the offense he admitted. While the *Hofsheier* decision discussed the factual scenarios that typically underlie the statutes it was considering, its equal protection analysis involved a comparison of 'persons *convicted* of oral copulation with minors and persons *convicted* of sexual intercourse with minors.' [Citation.] This approach jibes with the mandatory registration statutes themselves, which are triggered by certain convictions or juvenile adjudications, and not by the underlying conduct of those offenses per se. . . . [¶] Whatever the age of the victim, a juvenile adjudicated of committing unlawful intercourse under section 261.5, rather than lewd conduct under section 288, could not be required to register as a sex offender . . . . [Citation.] Having been adjudicated of committing non[]forcible oral copulation under section 288a, subdivision (b)(1) with victims who were in fact under 14, appellant is similarly situated with an offender adjudicated of having committed unlawful sexual intercourse under section 261.5 with a minor who was in fact under 14. The latter offender would not be required to register as a sex offender, and it would violate equal

protection to require appellant to do so, the only difference being the nature of the sexual act involved. [Citation.]" (*In re J.P.*, at p. 1299, original italics; see *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1375 [error to "ignore the crime of which a defendant is convicted and look instead to all of the crimes of which a defendant could have been convicted based on his conduct"]; but see *People v. Manchel* (2008) 163 Cal.App.4th 1108 (*Manchel*), disapproved on other grounds in *Picklesimer, supra*, 48 Cal.4th at p. 338, fn. 4 [because victim was 15 years old and defendant was at least 10 years older than she, mandatory registration requirement did not hinge on sexual conduct was oral copulation or sexual intercourse because either act constituted a lewd and lascivious act under section 288, subdivision (c)(1)].)

In re J.P. and *Manchel* reflect a difference of opinion concerning whether, in resolving the equal protection issue in circumstances different than those present in *Hofsheier*, the court looks beyond the statutory elements of the defendant's conviction. We need not resolve that issue in this case because in either event defendant's contention fails. Defendant's convictions under section 288, subdivision (a), and the underlying facts both establish he committed sexual acts against children under age 14, and acted with specific intent. He is therefore not similarly situated with a person convicted under section 261.5(d), which does not require a specific intent or necessarily involve children under age 14.[3] None of the cited cases suggest the Legislature violates equal protection when it restricts the good conduct credits of defendants convicted of violating section 288, subdivision (a).

[3] Because a similarly situated class is a prerequisite to a meritorious equal protection claim, we need not reach the issue of whether there is a rational basis or compelling interest to support a distinction between the two groups. (*Hofsheier*, *supra*, 37 Cal.4th at pp. 1199-1201.)

C. *Defendant Is Not Entitled to Additional Presentence Credits Under Section 4019*

In a supplemental opening brief, defendant argues we should remand for a new calculation of presentence conduct credits under the amended version of section 4019, effective January 25, 2010. (*People v. Brown* (2010) 182 Cal.App.4th 1354; cf. *People v. Rodriguez* (2010) 183 Cal.App.4th 1.) Defendant acknowledges defendants convicted of violating section 288, subdivision (a), do not qualify for enhanced credits under section 4019. (§ 4019, subds. (b)(1), (c)(1) ["[e]xcept as provided in Section 2933.1 and paragraph (2)"], subds. (b)(2), (c)(2) [enhanced credits denied for persons required to register as a sex offender or committed for a serious felony].) He asserts "the disparate treatment in the amended version of section 4019 between [defendant] and persons convicted of violating section 261.5 results in a violation of equal protection in the same way that the disparate treatment [under] section 2933.1 does . . . ." He acknowledges his argument hinges on whether we agree with his argument that the 15 percent limitation violates his constitutional rights to equal protection. As discussed earlier, we do not agree with defendant's contention. Consequently, his argument fails for the reasons provided in section B of this opinion.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.